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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 812

BRADLEY REED SMITH, *Petitioner*,

v.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

On Petition for Writ of Certiorari

BRIEF OF

GAY WILSON ALLEN; AARON ASHER (World Publishing Co.); HARRY S. ASHMORE (Encyclopaedia Britannica); BETTY BALLANTINE (Ballantine Books, Inc.); IAN BALLANTINE (Ballantine Books, Inc.); WILLIAM BARRETT; SHEILA BARRY (Taplinger Publishing Co.); JACQUES BARZUN; HOWARD K. BAUERNFEIND (J. B. Lippincott Co.); SAUL BELLOW; ERIC BENTLEY; LOUISE BOGAN; CHARLES G. BOLTE (The Viking Press, Inc.); E. E. BOOHER (McGraw-Hill Book Co.); WALTER I. BRADBURY (Harper & Brothers); NED BRADFORD (Little, Brown & Co.); GEORGE BRAZILLER (George Braziller, Inc.); GERMAINE BREE; HARVEY BREIT; JOHN MALCOLM BRINNIN; GEORGE P. BROCKWAY; EUGENE BURDICK; CHARLES R. BYRNE (Macfadden-Bartell Corp.); HERB CAEN (San Francisco Chronicle); ANGUS CAMERON (Alfred A. Knopf, Inc.); MARK CARROLL (Harvard University Press); JOHN CIARDI; HAROLD CLURMAN; EVAN S. CONNELL, JR. (Contact); JOHN COURNOS; PASCAL COVICI (The Viking Press, Inc.); PETER H. DAVISON; EDWARD DE GRAZIA; PATRICK DENNIS; JOHN DOS PASSOS; JAMES W. ELLISON (E. P. Dutton & Co., Inc.); RICHARD ELLMANN; JASON EPSTEIN (Random House); LAWRENCE FERLINGHETTI (City Lights Books); JOHN G. FULLER (Saturday Review); BERNARD GEIS (Bernard Geis Associates); MAXWELL GEISMAR; JACK GELBER; EMANUEL GELTMAN (The Free Press of Glencoe, Inc.); ARNOLD GINGRICH (Esquire); K. S. GINIGER (Hawthorne Books, Inc.); HERBERT GOLD; HARRY GOLDEN; MITCHELL GOODMAN; ROBERT GOTTLIEB (Simon & Schuster, Inc.); HOWARD GREENFELD (The Orion Press, Inc.); JOHN HOWARD GRIFFIN; RICHARD L. GROSSMAN (Grossman Publishers, Inc.); WILLIAM B. HARVEY (New York University Press); HIRAM HAYDN (Atheneum Publishers); HUGH M. HEFNER (Playboy); CHARLES A. S. HEINLE (Chilton Co., Book Division); JOSEPH HELLER; CECIL HEMLEY (The Noonday Press); JOHN HERSEY; GRANVILLE HICKS; LAWRENCE HILL (Hill & Wang, Inc.); WILLIAM HOGAN (San Francisco Chronicle); TAY HOHOFF (J. B. Lippincott Co.); JOHN CLELLON HOLMES; IRVING HOWE; B. W. HUEBSCH (The Viking Press, Inc.); RICHARD HUETT (Dell Publishing Co., Inc.); FRED JORDAN (Grove Press, Inc.); JACK KEROUAC; CHESTER KERR (Yale University Press); ROB-

ERT KIRSCH (Los Angeles Times); DONALD S. KLOPFER (Random House); HERMAN KOGAN (Chicago Daily News); JAMES LAUGHLIN (New Directions); JOHN T. LAWRENCE (William Morrow & Co., Inc.); SEYMOUR LAWRENCE (Atlantic Monthly Press); REGINA LEBOWITZ (Farrar, Straus & Cudahy, Inc.); MAX LERNER; FREEMAN LEWIS (Pocket Books, Inc.); R. W. B. LEWIS; ROBERT LOWELL; ROBERT M. MACGREGOR (New Directions); NORMAN MAILER; BERNARD MALAMUD; MARYA MANNES; KEN McCORMICK (Doubleday & Co., Inc.); CARSON McCULLERS; CAREY McWILLIAMS (The Nation); DANIEL MELCHER; THORPE MENN (Kansas City Star); PETER MICHELSON (Chicago Review); ERIC MOON (Library Journal); FREDERICK MORGAN (Hudson Review); TRUMAN NELSON; HOKE NORRIS (Chicago Sun-Times); THEODORE M. O'LEARY (Kansas City Star); NORMAN HOLMES PEARSON; ARTHUR PELL (Liveright Publishing Corp.); BERNARD B. PERRY (Indiana University Press); ROBERT PHELPS (George Braziller, Inc.); WILLIAM PHILLIPS; SAMUEL H. POST (Belmont Books); LAWRENCE CLARK POWELL; BEN RAEBURN (Horizon Press, Inc.); HENRY RAGO (Poetry); THEODORE REIK; ELMER RICE; HAROLD ROBBINS; HENRY ROBBINS (The Dial Press, Inc); PAUL H. ROHMANN (Antioch Review); BARNEY ROSSET (Grove Press, Inc.); HOWARD W. SAMS (The Bobbs-Merrill Co., Inc.); MARK SCHORER; WEBSTER SCHOTT (Kansas City Star); PETER SCHWED (Simon & Schuster, Inc.); WILLIAM R. SCOTT (William R. Scott, Inc.); EDWIN SEAVER (George Braziller, Inc.); RICHARD SEAVER (Grove Press, Inc.); ROD SERLING; KARL SHAPIRO; LEONARD SHATZKIN (The Crowell-Collier Publishing Co.); WILLIAM L. SHIRER; JAMES H. SILBERMAN (Random House); IRVING STONE; LYLE STUART (Lyle Stuart, Inc.); WILLIAM STYRON; AARON SUSSMAN (Sussman & Sugar, Inc.); ALAN SWALLOW (Alan Swallow, Publisher); RICHARD TAPLINGER (Taplinger Publishing Co., Inc.); LIONEL TRILLING; ARTHUR W. WANG (Hill & Wang, Inc.); HOWARD SAYRE WEAVER (Yale University Press); RICHARD WILBUR; JOHN C. WILLEY; DONALD A. WOLLHEIM (Ace Books, Inc.); WILLIAM A. WOOD (University of Chicago Press); THOMAS YOSELOFF (Thomas Yoseloff, Inc.).

AS AMICI CURIAE

INTEREST OF AMICI

Amici are more than one hundred authors, editors and publishers concerned that a bookseller can be put in threat of jail for his readiness to distribute a work such as *Tropic of Cancer*. We consider this incompatible with freedom of expression and the right to read. We ask that an end be put to the censorship of books.[1]

[1] Consent to the filing of this brief by *amici* was given by both parties. *Amici* earlier filed, with consent of both parties, a brief in support of the *Petition for Writ of Certiorari*.

ARGUMENT

I

There can be no blinking the fact that this nation has long endured a censorship of literature, generally administered through criminal proceedings, often prompted by civic and religious groups.[2] Though these have always been conducted under the banner of stamping out a traffic in worthless obscenity, much that has been banned has not been worthless or obscene. Much instead has found important place in the nation's literature and development of ideas.[3] That this should be is, of course, not new.[4]

Fifteen years ago, this Court last squarely faced the question whether a literary work of importance could constitutionally be suppressed by a criminal obscenity law; the Court's answer then was muted by its equally

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[2] See: Lockhart & McClure, "*Literature, the Law of Obscenity, and the Constitution*", 38 Minn. L. Rev. 295, 302-320, 334-374 (1954); Downs, *The First Freedom* (1960); Ehrlich, *Howl of the Censor* (1961); Haight, *Banned Books* (1955); Blanshard, *The Right to Read* (1955); de Grazia "*Obscenity and the Mail*", 20 Law & Contemp. 615 (1955); American Library Association, *The First Freedom* (1961); House Subcommittee on Postal Operations, 86th Cong. 1st Sess., "*Report to the Committee on Post Office and Civil Service*" at 29 ff. (1959). This Court's decisions in *Roth* and *Manual Enterprises*, op. cits. *infra* notes 6 and 7, did not end the censorship, as the case before it today amply demonstrates. See also the authorities cited *infra* note 15; Lockhart & McClure, op. cit. *infra* note 25 at 9 ff. (1960); and the many bookseller and library incidents currently reported in the *Newsletter on Intellectual Freedom* of the American Library Association and the *Freedom to Read Bulletin* of the American Book Publishers' Council.

[3] See the documentation offered by the authorities cited *supra* note 2. The authors, ancient and modern, foreign and American, are legion. It appears that few authors of major importance have escaped censorship.

[4] See Mill, J. S., *On Liberty*.

divided bench.[5] The 1956 dicta of *Roth* v. *United States*,[6] reiterated in the 1962 opinion of *Manual Enterprises, Inc.* v. *Day*,[7] pointed, however, to a freeing of any literature distinguishable from obscenity. What remains is to confirm this freedom[8] and point out the signs by which prosecutors and trial courts may distinguish protected matter, and be enabled to confine the penalties of obscenity laws to that which is worthless and obscene. If this be forthrightly done, literature in America will in fact be freed.[9]

Amici are aware that after Petitioner's conviction was upheld below and after this Court had issued a *writ of certiorari* in the case, the highest Court of California, in a civil proceeding, unanimously found *Tropic of Cancer* protected by the Constitution and not obscene. (*Zeitlin* v. *Arnebergh*, decided July 2,

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[5] *Doubleday* v. *New York*, 335 U. S. 848 (1948), involving Edmund Wilson's "*Memoirs of Hecate County.*"

[6] 354 U. S. 476.

[7] 370 U. S. 478.

[8] As was done in *Attorney General* v. *Book Named Tropic of Cancer*, 184 N.E. 2d 328 (1962); *McCauley* v. *Tropic of Cancer*, ... Wisc. 2d .... (1963); and *Zeitlin* v. *Arnebergh*, ... Cal. 2d .... (1963).

[9] Required is a candid rejection of the thesis that recognizable literature may be found obscene and on that basis banned. The qualified thesis would leave literature free unless its dissemination in a specific situation constituted an incitement or otherwise was intended or likely to cause damage or injury of a type which a State may validly control. The dissemination of worthless material, from which class would be excluded every recognizable piece of literature, every literature having importance for anyone, might be left punishable under the "prurient interest" and "patently offensive" tests. Cf. *Roth* v. *United States*, 354 U. S. 476, 494, 497, 511; *Manual Enterprises* v. *Day*, 370 U. S. 478; *Bantam Books* v. *Sullivan*, ... U. S. .... (1963); *Marcus* v. *Search Warrant*, 376 U. S. 717, 730; Kalven, "The Metaphysics of Obscenity," in *The Supreme Court Review*, 1, 13 (1960). See *infra* notes 26 and 42.

1963).[10] But *Amici* are aware too: that eight days thereafter the highest Court of the State of New York, in a criminal case, found the same book unprotected by the Constitution and obscene (*People* v. *Fritch*, decided July 10, 1963); that although the highest Courts of the States of Massachusetts[11] and Wisconsin,[12] as well as California, have also found the book constitutionally protected and not obscene, the book is barred from shipment to those States from New York;[13] that criminal proceedings presently pend against, and new ones threaten the publisher and its distributors in the City of New York,[14] as well as booksellers in other parts of the country;[15] that a warrant for the arrest

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[10] *Amici* understand that Respondent herein is seeking reconsideration of *Zeitlin* v. *Arnebergh* and may appeal to this Court in that case.

[11] *Attorney General* v. *Book Named Tropic of Cancer*, op. cit. *supra* note 8.

[12] *McCauley* v. *Tropic of Cancer*, op. cit. *supra* note 8.

[13] New York's criminal law, Section 1143, prohibits any deposit in the mails or other transporting of "obscene" matter. Since the highest court of the State of New York has declared *Tropic of Cancer* "obscene", any person who ships the book out-of-state becomes liable to arrest and prosecution.

[14] See Appendix I to this brief and notes 13 and 18.

[15] See the incidents of threats, prosecutions and suppression reported in the American Library Association's *Newsletter on Intellectual Freedom*, Vol. 10, No. 4 (January, 1962) through Vol. 12, No. 4 (July 1963). See also *New York Times Book Review* for January 21, 1962, at page 4: "The Most Recent Troubles of Tropic" by Anthony Lewis. There appear to have been 27 arrests in New Jersey alone. Other States include New York, Ohio, Minnesota, Indiana, Illinois, Colorado, Tennessee, Connecticut, Florida, Texas, Kentucky, Pennsylvania, Delaware, Washington, Oklahoma, Alabama, Iowa and Missouri. The most recent conviction occurred in Indianapolis, Indiana where Mr. Keith Cuffel, a divinity school graduate and manager of Curry's College Bookstore was found guilty of selling the book. See *Indianapolis Times* for June 14, 1963.

of the book's author, Henry Miller, has been issued;[16] and that the people of several,[17] and possibly all,[18] States are today being deprived of their rights to acquire and read this book.[19] In such extraordinary circumstances of nation-wide constitutional conflict, confusion and derogation, we submit it is an urgent duty of this Court now to free from threat of punishment, once and for all the nation, those involved in the creation and dissemination of *Tropic of Cancer*, and to announce, once and for all the nation, the right of the people to read this and any other work of literary, artistic or other import.[20]

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[16] See *New York Times* for Oct. 16, 1962 and Appendix I to this brief.

[17] See note 15 *supra*.

[18] The publisher, Grove Press, Inc. and its distributors are prohibited under New York law from shipping any copies from New York to bookdealers in any other State—including Massachusetts, Wisconsin, and California. See note 13 *supra*.

[19] But not only this book. For example, John Cleland's *Memoirs of a Woman of Pleasure* ("Fanny Hill") has now been banned in New York and thereby throughout the nation. See *New York Times* for July 25, 1963 (quoted *infra* note 30) and note 13 *supra*.

[20] It is noteworthy that in England, *Tropic of Cancer* was freed for all the nation by the Attorney General announcing he was not going to institute proceedings under the Obscene Publication Act of 1959 against the publishers, in respect of the book's pending publication. See *New York Times* for April 12, 1963, and *Appendix* II to this brief. Under the English law, literary merit is a defense to a charge of obscenity. *Ibid.* To remand this case without opinion on the strength of *Zeitlin* might free Petitioner but leave the author, his publisher, its distributors and bookdealers, throughout the nation, under continued threat of prosecution, and the people and the book perhaps "three-fiftieths" free. See notes 13, 16 and 18 *supra* and *Appendix* I. Because the Court in *People* v. *Fritch* (.... N. Y. 2d ...., decided July 2, 1963) remanded for a new trial on the *scienter* issue, the state-wide, possibly nation-wide, ban resulting could not be appealed from to this Court. See *infra* note 30.

The degree to which the *Roth-Manual Enterprises* tests can be applied in the censorship of literary expression is no longer subject to conjecture. Though these tests were fashioned by this Court to insure "the door barring federal and state intrusion" could be opened "only the slightest crack," lower courts have readily managed to plant their feet in that door while one of the highest courts in the land has now inserted head and shoulders. Despite the evident facts that three other State high courts had reached a diametrically opposed decision,[21] over one million Americans had long before purchased the book,[22] and critics nation-wide and world-wide had testified to its importance,[23] the New York Court of Appeals found *Tropic*

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[21] All three cases were mentioned by the dissenting judges.

[22] By April, 1962, some 1,100,000 copies had been reported sold. See *Herald Tribune Book Section* for April 29, 1962, at page 3. The work appeared on the *N. Y. Times* national best-seller lists from August 27, 1961, through December 3, 1961.

[23] Among these were: Karl Shapiro, Norman Cousins, Wallace Fowlie (*Age of Surrealism*, 1950), Lawrence Durrell, George Orwell (Inside the White Whale and Other Essays, 1940), Charles Glicksberg, Osbert Sitwell, Sir Herbert Read, Dorothy Parker, Edmund Wilson ("Twilight of the Expatriates" in *The Shores of Light*, 1952), John Ciardi, Horace Gregory, Philip Rahv, William Carlos Williams, T. S. Eliot, Harry T. Moore, Ben Ray Redman, Eric Moon, and Anais Nin. The published work itself contained assignments of importance by Miss Nin and Mr. Shapiro (in the *Preface* and *Introduction* respectively). Among the journals which prominently reviewed the work were the *New York Times*, *New York Herald Tribune*, *New York Post*, *Saturday Review of Literature*, *Library Journal*, *Milwaukee Journal*, *Esquire* and *The Nation*. See Appendix I of *Petition for Writ of Certiorari* herein. The work had been published in France (1934), Czechoslovakia (1938), Germany (1952), Denmark (1953), Japan (1954), Sweden (1955), United States (1961), Italy (1962) and Israel (1962). Consult:

of Cancer obscene and, worse, hard-core pornography. Thus did it, though situated in the heartland of American publishing,[24] not only broadcast the infirmity of the *Roth-Manual Enterprises* obscenity tests, but also forecast the futility of any attempted tightening of those tests which would rely on the notion of "hard-core pornography". Notwithstanding its auspicies,[25] any such revision, it is already apparent, would

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Perles, *My Friend Henry Miller* (1956); University of California at Los Angeles, Special Collections, *Henry Miller Collection: Apostles on Appeal*, Docket No. 13227, *Besig* v. *United States*, 208 F. 2d 142 (C.A. 9, 1953) reprinting reviews from such journals as: *La Marseillaise*, Paris, Sept. 12, 1946; *New English Weekly*, London, Dec. 19, 1946; *New Statesman and Nation*, London, February 1, 1937; *Le Petit Marocain*, Casablanca, December 30, 1947; *Soviet Literature Monthly* #6, 1950; Paris Edition, *New York Herald Tribune*, October 24, 1946; *New Republic*, April 21, 1941; *Vogue*, October 1, 1943; *Mademoiselle*, August 1944; *Time*, December 24, 1945; *Alumni Magazine, Dartmouth*, April 1943; Harpers, April 1949, *Revue Litteraire Mensuelle*, Nos. 5 and 6, 1943, Tunis (1949-51); *Algemeen Handelsblad*, Amsterdan, July 15, 1951; *Yale Review*, Spring 1951.

[24] When the New York Court of Appeals misapplies the *Roth-Manual Enterprises* tests to find a work of literature obscene, all the nation's access to the work is endangered. See notes 13, 18 and 19, *supra*.

[25] See Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 19, 58-68 (1960); Kronhausen, *Pornography and the Law* (1959) at 18; *Zeitlin* v. *Arnebergh* op. cit. *supra* note 8; *McCauley* v. *Tropic of Cancer*, op. cit. *supra* note 8; *Attorney General* v. *Book Named Tropic of Cancer*, op. cit. *supra* note 8; cf. *Roth* v. *United States*, *supra* note 6 at 507; *Manual Enterprises* v. *Day*, *supra* note 7. Professor Harry Kalven's emphasis on the "worthless" seems the sounder approach: "the obscene can include only that which is worthless." Op. cit. *supra* note 9 at 13. Even "pornographic" comic booklets may convey crude political ideas. See de Grazia, op. cit. *supra* note 2 at footnote 30. The "Gathings Committee" in 1952 found most paper-back books being sold at drugstores and newsstands "pornographic." *Ibid* at page 616.

also fail to frustrate those dedicated to finding even important literature obscene and to maintaining the censorship over books.[26]

II

The fault of *Roth-Manual Enterprises* is their permitting a court, as in the case below, to subject even a work having evident literary importance to the tests prescribed for the suppression of the worthless obscene. With respect to recognizable works of literature and art, however they may be concerned with

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[26] Literary and artistic expression, if it is to be free, simply cannot be tethered to the prurient interests of average men or to notions like "obscenity" or "pornography" which inevitably confound objective judgments—whether applied by juries, trial judges, or the benches of our highest courts. If there is to be constitutionally permissible culpability for uttering "obscene" matter, the issue should be drawn around the defendant's particular conduct in a particular situation. Cf. *Roth* v. *United States*, *supra* at 495, 497 and 511. This seems to have been the sense of the oft-cited dicta in *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, where epithets were in mind, and the first of Chafee's "real or supposed social injuries" attributable to obscenity, i.e., "offensiveness, which links indecency to profanity and public drunkedness." *Government and Mass Communications* at 211. The A. L. I. was concerned that "there would be no public display to shock people of stricter propriety." Model Penal Code § 207.10 (Tent. Draft No. 6, 1957) *Comments* at page 13. Compare: *Winters* v. *New York*, 333 U. S. 507, 515 (1948) ("acts of gross and open indecency or obscenity"). This Court in *Manual Enterprises* v. *The Day*, op. cit. *supra* note 7, also suggested that material which merely "stimulates impure desires relating to sex" cannot be suppressed, and that a condemnation as obscene might require indecency amounting to visual assault. Much the same theory, that criminal prosecution for obscenity should be limited to obscenity in the nature of an epithet, an insult, or an assault was advanced by the Solicitor General of the United States in defending the federal statute against *Roth's* challenge to its constitutionality. See *Brief for the United States* at pages 34-42.

portrayals of sex,[27] those tests cannot apply. Such expression must be afforded the full protection of the guarantees, and be enjoined or penalized only under conditions of a sort which otherwise justify specific abridgements of the freedoms of speech and press.

Literature and art, no less than motion pictures, are paramount means for the circulation of ideas and for the carrying-out of this nation's deepest dialogue.[28]

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[27] *Roth v. United States*, *supra* note 6. The sexual aspect has been responsible for by far the greater part of all censorship of literature and art, perhaps because of the deep-seated connections between religion, sex and art. It appears to have been no accident that the first case to have recognized the crime of "obscene libel" involved a work called "Venus in the Cloister or the Nun in her Smock"—*Curl's Case* (1727) 2 Stra. 788; See St. John-Stevas, *Obscenity and the Law* (1956) at 23 ff.; Schroeder, *Obscene Literature and Constitutional Law* (1937) at 371 ff.; cf. Cornford, *The Origin of Attic Comedy* (1961); Kaplan, *"Obscenity as an Esthetic Category,"* 20 Law & Contemp. 544 (1955); Goodman, *"Pornography, Art & Censorship,"* in *Commentary* (March, 1961) at 203-212.

[28] Cf. *Zeitlin* v. *Arnebergh*, *supra* note 8. The philosophical and psychological support for this proposition is extensive. See, e.g., Dewey, *the Public and Its Problems* (1946), especially pages 163, 183-184; Dewey, *Freedom and Culture* (1939), especially pages 9-10; Freud, *Gesammelte Schriften* (1940-1952), Vol. I, 227, Vol. VII, 33, 70, XIV, 399, 495, quoted in Jones, *The Life and Work of Sigmund Freud*, Vol. III, 418-420 (1957), McKeon, Merton & Gelhorn, *The Freedom to Read* (1957); Lockhart & McClure, *"Literature, The Law of Obscenity, and the Constitution,"* 38 Minn. L. Rev. 295, 368-373 (1954); Kaplan, *"Obscenity as an Esthetic Category,"* 20 Law & Contemp. 556-559 (1955); Goodman, "Pornography, Art & Censorship" in *Commentary* (March, 1960) at 203-212; Kalvin, op. cit. *supra* note 9 at 16 (1960); Meiklejohn, "The First Amendment is an Absolute" in *The Supreme Court Review* (1961) at 245, 257, 262-263; Kallen, "The Ethical Aspects of Censorship" in *Social Meaning of Legal Concepts* No. 5, N.Y.U. School of Law (1953) at 34-71; Conant, *Address to the Modern Language Association* (1940).

Only by affording the widest possible public access to them will the historic function of freedom of expression be fulfilled. The application of criminal obscenity laws against recognizable works of literature and art can only subvert this function. Even were there not ample testimony of the invidious effect such censorship has on creative effort,[29] one would need be insensible to the reality of human conduct to imagine authors, editors, publishers and the others concerned with the private and public dissemination of books, remain unaffected by such prosecutions. So is it everywhere understood that obscene literature prosecutions are directed almost never at incarcerating a culpable vendor, but almost always at intimidating every distributor.[30]

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[29] Lockhart & McClure, *op. cit. supra* note 2 at 372-73; Kallen *op. cit. supra* note 28. Compare: "The greatest harm done is to those who are not heretics, and whose whole mental development is cramped, and their reason carved, by the fear of heresy. Who can compute what the world loses in the multitude of promising intellects combined with timid characters, who dare not follow out any bold, vigorous independent train of thought, lest it should land them in something which would admit of being considered irreligious or immoral?" (Mill, J. S., *On Liberty*) (Or obscene!)

[30] See Lockhart & McClure, op. cit. *supra* note 25 at 11 (1960); see also the *New York Times* for July 11, 1963, reporting on the *Tropic of Cancer* decision in *People* v. *Fritch*, *supra*: "As a result of today's decision, the sale, advertising, gift, loan or distribution of the book, or its possession with the intent of doing these things, constitutes a misdemeanor." Cf. the *New York Times* for July 25, 1963, reporting on a State Supreme Court ruling that John Cleland's *Memoirs of a Woman of Pleasure* published by G. P. Putnam's Sons was obscene: "Under the ruling, the sale of the book in the State is illegal . . . Anyone selling 'Fanny Hill' could be held in contempt of Court and be liable to a 30-day jail sentence or a fine." These effects *are* censorship. Significantly, they follow even though "scienter" may *never* be shown. See note 20 *supra*. This seems not to have been noticed by commentators on *Smith* v. *California*, 361 U.S. 147, including Kalven, op. cit. *supra* note 9 at 37.

and librarian[31] within reach of the prosecuting authorities' process, into suppressing the work and any others like it.

If, then, book censorship is to be eliminated, whenever a court is confronted with a recognizable work of literature or art the *Roth-Manual Enterprises* tests cannot apply. Thus, although worthless utterances might validly have their "obscenity" tested by local standards of decency, wherever a protected work is challenged, only national constitutional standards can apply.[32] These ought embrace nothing less than the right of every adult person, whatever the State in which he may reside, to read the literature and view the art of his choice,[33] thereby to gain exposure to the

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[31] See, for example, the *Statement* of Emerson Greenaway, Director, the Free Library of Philadelphia, on December 1, 1961, reported in American Book Publishers Council, *Freedom to Read Bulletin*, December 8, 1961: "As Director of the Free Library, I am now forced to order all Free Library copies of Henry Miller's *Tropic of Cancer* withdrawn from circulation"; and this and other instances of library censorship reported in the American Library Association's *Newsletter on Intellectual Freedom* for April, 1962.

[32] If freedom to read is a right protected by the First Amendment (Cf. *Smith* v. *California*, 361 U. S. 147, 153) it is a right of all citizens irrespective of the State in which they reside, the States are forbidden from abridging it, as they are forbidden uniformly from abridging their citizens' right to assemble or petition—by operation of the "privileges and immunities" clause, if not the "due process" clause, of the Fourteenth Amendment. See Crosskey, *Politics and the Constitution*, Vol. II at 1094-5 (1953); Compare: Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, *supra* note 28 at 110-114.

[33] See: National Council of Teachers of English, *The Students Right to Read* (1962) at 8; compare: the statement attributed to *Las Vegas Sun* Editor, Hank Greenspun, regarding a *Tropic of Cancer* bookseller's arrest: "We never dreamed the police would get into it . . . It is my feeling that before anything is banned

widest range of ideas communicable through those forms. Further, just as no local authority could validly suppress within its jurisdiction ideas and information freely circulated within another, so ought every authority give credit to the findings of other authorities—whether private or governmental, in State or out—that a work, having some redeeming importance, is to be accorded constitutional protection.[34] The issue cannot turn on *who* may find a work important or *where* it may so be found, but simply on *whether* anyone, anywhere finds it to have a worth.

III

In the case at hand, such findings abounded. Not only was it known to the courts below (as to Petitioner) that federal authorities had determined the

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through censorship, it should be read by the censor and if the censor can stand it, so can I''; reported in American Library Association *Newsletter on Intellectual Freedom* for May 1963; *McCauley* v. *Tropic of Cancer*, op. cit. *supra* note 8; ''An offended reader need only close it in order to escape''; cf. *Butler* v. *Michigan*, 352 U. S. 380.

[34] This is the reverse side of the medal of ''*scienter*''. Wherever such findings anywhere are known to exist, the possibility of *scienter* must be excluded. As suggested by Judge Dye, dissenting in *People* v. *Fritch*, *supra:* ''In truth, it is doubtful whether *scienter* can ever be proven in view of other States.'' (Citing the Massachusetts, Wisconsin and California courts holding *Tropic of Cancer* constitutionally protected and not obscene.) Of course, an awareness of the existence of ''adverse'' findings (i.e., findings of worthlessness or ''obscenity'') cannot be understood to impute *scienter*, unless those findings are unanimous or exclusive. Otherwise a single adverse ruling could blanket a State or the nation with censorship. See notes 20 and 30 *supra*.

work could no longer be held obscene,[35] but it was also evident the work was now, as it had been many years before, the subject of critical comment and public discussion,[36] and was, moreover, freely being distributed in other counties[37] and states.[38] Whenever a challenged work is shown either to have secured critical attention in newspapers or journals concerned with such things, or to have been examined and found unsuppressable as obscene in any other locale or jurisdiction in the nation, or to have literary, artistic, scientific, political or other importance for persons prepared so to declare in open court, then it should be the plain duty of a prosecutor or judge to dismiss the criminal proceedings—at least in the absence of a charge of intent to engender specific harm. For no findings of worthlessness can survive where persons have publicly declared or are prepared in court to declare that a worth exists for them.[39] And no city or State may hold its resi-

[35] See Appendices E and F of *Petition for Writ of Certiorari* herein. Compare with *Brief for the United States* (filed in *Roth* v. *United States*, *supra* note 6) at pages 29, 35.

[36] See, for example, the authorities cited *supra* note 22. Of course, a number of witnesses also appeared and testified for and against the book's importance. Such court-room testimony should be considered unnecessary whenever it can be judicially noticed or established by other means that the book cannot be found worthless because it has evident importance for some.

[37] Prior to Petitioner's conviction, booksellers in Marin County, California, for example, had been acquitted and were known to be selling the work. See *Zeitlin* v. *Arnebergh*, *supra* note 8 at fn. 1.

[38] The book was generally available at public libraries in California and throughout the nation. See *Library Journal*, Vol. 88, No. 3 (Feb. 1, 1963) at 501, 503-04; ALA *Newsletter on Intellectual Freedom* for April, 1962 (Vol. 11, No. 1); and note 22 *supra*.

[39] "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind." Mill, J.S., *On Liberty*.

dents down to a lesser freedom of expression, a smaller right to read, than any other city or state, or the nation.

Criminal prosecutions for obscenity are poor forums for debates over the importance of a work of literature of art.[40] Once a recognizable work is involved, every attempt by judge or jury, with or without the assistance of experts, to measure the work's obscenity or its social importance, simply mocks the constitutional tradition.

IV

The permissible juridical suppression of obscenity must begin and end with the worthless.[41] Criminal prosecutions for obscenity should once more become means for ascertaining the guilt of persons charged with assaulting the sexual sensibilities of others through univited[42] utterances neither designed nor likely to convey any idea or information having the slightest social importance. This seems to have been the original confine, and is certainly a proper confine, for obscenity laws. Permitted application to

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[40] *In rem* proceedings such as were undertaken in *McCauley* v. *Tropic* and *Attorney General* v. *Book Named Tropic of Cancer*, op. cit. *supra* note 8, or bookseller-plaintiff actions such as were undertaken in *Zeitlin* v. *Arnebergh*, *Ibid*, seem to elicit better results in a less barbaric climate, but contribute little more to the "debate" and, at least in the case of the *in rem* proceeding, also invite censorship. (Contra?: *Kingsley Books* v. *Brown*, 354 U. S. 436.) The "Fanny Hill" suppression cited *supra* note 30 was effected *in rem*.

[41] Kalven, op. cit. *supra* note 9 at 13

[42] The "uninvited" quality of condemnable "obscenity" is related to the "offensive" aspect noticed in *Manual Enterprises* and to the "expletive" or "assaultive" quality which appeared as the basis of the early common law offense. See St. John-Stevas, op. cit. *supra* note 27; *Sidley's Case*, 1 Sid. 168 (1663). And see the authorities cited *supra* note 26. This might well be controlled by governmental authority without any significant interference with freedom of expression, any censorship of literature or art.

literature and art, or to motion pictures,[43] such a law must always become a mechanism for censorship, for the deliberate suppression of ideas about sex and other things in disfavor with those in authority or those close to authority.

CONCLUSION

The judgment of the Court below should be reversed. The *Roth-Manual Enterprises* rules for the testing of expression should be qualified so as to remove all threat to any not worthless, and permit no finding of worthlessness where there are persons to assert its worth.

Respectfully submitted,

EDWARD DE GRAZIA
Attorney for Amici Curiae,
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Washington 36, D. C.

Of Counsel:

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Washington 36, D. C.

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[43] As in *Jacobellis* v. *Ohio*, No. 164. It seems clear the jury should not and cannot any longer be relied upon to regulate the freedom to express ideas on sexual or other "vital problems of human interest and public concern". Cf. Lockhart & McClure, op. cit. *supra* note 25 at 114-120. To do so would leave no room for innovation, for new or old ideas unacceptable to the average man. This Court must push beyond the 1913 frontier of *United States* v. *Kennerley*, 209 Fed. 119 (S.D.N.Y. 1913) and hold that: "to put thought in leash to the average conscience of the time is *not* tolerable". Neither should it be leashed to the views of the *literati* except to the extent available to "qualify" for constitutional protection (i.e., remove from the class of "worthless") works having any literary importance, as scientists would "qualify" works having any scientific importance, though challenged as "obscene", as were, for example, works by Freud, Kraft-Ebbing, Steckel, Margaret Mead and Simone de Beauvoir. See de Grazia, op. cit. *supra* note 2 at 615.

APPENDIX I

(Copy)

CRIMINAL COURT OF THE CITY OF NEW YORK
KINGS COUNTY

COURT OF SPECIAL SESSIONS
THE CITY OF NEW YORK
BOROUGH OF BROOKLYN

THE PEOPLE OF THE STATE OF NEW YORK, *Plaintiffs*
against
HENRY MILLER, Imperial News Co. Inc., BARNEY ROSSET, Brooklyn News Co. Inc., GROVE PRESS INC., Pacific News Co. Inc., *Defendants*

THE DISTRICT ATTORNEY OF THE COUNTY OF KINGS, by this information accuses the defendants of the crime of OBSCENE PRINTS AND ARTICLES IN VIOLATION OF SECTION 1141 OF THE PENAL LAW, committed as follows:

The defendants, on or about and between January 1, 1961 and June 30, 1962, in the County of Kings, unlawfully sold, loaned, gave away, distributed, showed and transmutted, and offered to sell, lend, give away, distribute, show and transmute, and had in their possession with intent to sell, lend, distribute, give away, show and transmute, and advertise, and offered for loan, gift, sale and distribution, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, and written and printed matter entitled "HENRY MILLER, TROPIC OF CANCER" and bearing on its cover the legends "A BLACK CAT BOOK 95¢", "THIS IS THE COMPLETE UNEXPURGATED GROVE PRESS EDITION ORIGINALLY PUBLISHED AT $7.50" which book and printed matter was copyrighted in 1961 by Grove Press, Inc. and is captioned "FIRST BLACK CAT EDITION 1961—THIRD PRINTING—MANUFACTURED IN THE UNITED STATES OF AMERICA", and which book and printed matter depicts and represents acts and scenes wherein the sexual organs of both male persons and female persons are portrayed and described in manners connoting sex degeneracy and

sex perversion, and which acts, scenes and descriptions were of such a pornographic character as tend to incite lecherous thoughts and desires; and the defendants designed, copied, drew, printed, uttered and published, and manufactured and prepared said book and printed matter, and wrote, printed, published and uttered, and caused to be written, printed, published and uttered, an advertisement and notice giving information, directly and indirectly, stating and purporting so to do, where, how, and whom, and by what means and what purports to be, the said obscene, lewd, lascivious, filthy, disgusting and indecent book and printed matter can be purchased, obtained and had.

(Blank Form)

COURT OF SPECIAL SESSIONS
THE CITY OF NEW YORK
BOROUGH OF BROOKLYN

THE PEOPLE OF THE STATE OF NEW YORK, *Plaintiffs*
against

Defendant

SECOND COUNT

THE DISTRICT ATTORNEY OF THE COUNTY OF KINGS, by this information accuses the defendant of the crime of CONSPIRACY, committed as follows:

The defendants, on or about and between January 1, 1961 and June 30, 1962, in the County of Kings, unlawfully and corruptly conspired, combined, confederated and agreed together to commit the crime of Obscene Prints and Articles in violation of Section 1141 of the Penal Law, under a certain scheme and plan whereby the defendant arranged to unlawfully sell, lend, give away, distribute, show and transmute, and to offer to sell, lend, give away, distribute, show and transmute, and to have in their possession with intent to sell, lend, distribute, give away, show

and transmute and to advertise, and offer for loan, gift, sale and distribution, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic, and disgusting book and written and printed matter entitled "HENRY MILLER, TROPIC OF CANCER" and bearing on its cover the legends "A BLACK CAT BOOK 95¢" This is the complete unexpurgated Grove Press edition originally published at $7.50", and which book and printed matter was to be copyrighted in 1961 by the defendant Grove Press, Inc. and was to bear the caption "FIRST BLACK CAT EDITION 1961—THIRD PRINTING—MANUFACTURED IN THE UNITED STATES OF AMERICA".

It was the plan of the said conspiracy that the said book and printed matter was to be prepared and authored by the defendant Henry Miller and was to depict and represent acts and scenes wherein the sexual organs of both male persons and female persons were to be portrayed and described in manners connoting sex degeneracy and sex perversion and were to be of such a pornographic character as would tend to incite lecherous thoughts and desires.

It was part of the plan of the said conspiracy that the defendants Grove Press, Inc., and Barney Rosset, was to print, publish and utter the said book and printed matter while the defendant IMPERIAL NEWS CO. INC., BROOKLYN NEWS CO. INC., PACIFIC NEWS CO. INC. were to act as distributors of the said book and printed matter.

It was part of the plan of the said conspiracy that the defendants were to design, copy, draw, print, utter and publish and manufacture and prepare said book and printed matter. It was part of the plan of the said conspiracy that the defendants were to write, print, publish and utter, and cause to be written, printed, published and uttered, an advertisement and notice giving information, directly and indirectly, stating and purporting so to do, where, how and whom and by what means and what purports to be, the said obscene, lewd, lascivious, filthy, dis-

gusting and indecent book and printed matter, can be purchased, obtained and had.

OVERT ACTS

1. In pursuance of said conspiracy, and to effect the purposes and objects thereof, the defendant Henry Miller, on or about and between January 1, 1961, and June 30, 1962, in the County of Kings, prepared and authored the said book and printed matter entitled "HENRY MILLER, TROPIC OF CANCER" and therein depicted and described acts and scenes wherein the sexual organs of both male persons and female persons were portrayed and represented in manners connoting sex degeneracy and sex perversion.

2. And in further pursuance of said conspiracy, and to effect the purposes and objects thereof, the defendant Grove Press, Inc., and Barney Rosset, on or about and between January 1, 1961 and June 30, 1962, in the County of Kings, printed, published and uttered the said book and printed matter.

3. And in furtherance of said conspiracy, and to effect the purposes and objects thereof, the defendants Imperial News Co. Inc., Brooklyn News Co., Inc., and Pacific News Co., Inc., in the County of Kings, distributed the said book and printed matter at various locations.

EDWARD S. SILVER
District Attorney

BROOKLYN, N. Y., OCTOBER 15, 1962

APPENDIV II*

DIRECTOR OF PUBLIC PROSECUTIONS
12 Buckingham Gate, London S.W.1
VICtoria 6912

Please quote: DD.356.63
Your reference: EG:gf

April 22, 1963

re Tropic of Cancer

Dear Sir,

There has been no official statement with regard to the above book except that the Attorney General has stated that he was not going to institute proceedings under the Obscene Publications Act 1959 against Messrs. Calder, the publishers, in respect of the impending publication of the above book.

The following considerations are material:—

Under the Obscene Publications Act the definition of obscenity is tied to the circumstances of a sale. Thus the sale of a book to a child might offend against the Act while the sale of the same book to an adult might not.

Accordingly a decision not to prosecute in order to prevent a book being published does not and cannot, preclude a subsequent prosecution if the particular circumstances of a sale are such as to justify a prosecution.

In this country criminal proceedings may be instituted by anyone.

Accordingly a decision by the Attorney General or the Director not to prosecute does not and cannot prevent the institution of criminal proceedings by any private person who feels aggrieved by the publication or sale of the book.

* Copy of letter addressed to Elmer Gertz, Esq., 120 South La Salle Street, Chicago 3, U.S.A.

The following are defences to charges against the Obscene Publications Act, (1) that the book was not obscene, (2) that its publication was justified as being in the public interest on the grounds of the book's literary merit.

The former is solely a question for the Court and no evidence may be called. "The book must speak for itself". But expert evidence may be called as to the book's literary merit.

Accordingly whether a prosecution is likely to succeed depends to a considerable extent on the quality of the evidence available as to the book having or not having substantial literary merit.

If when a book is about to be offered for sale criminal proceedings are instituted and an acquittal follows, the sale of the book is likely to be greatly increased.

Having regard to all these considerations the Director decided not to institute criminal proceedings at this stage.

I trust that these observations will be of assistance to you.

Yours sincerely,

Maurice Crump
(Maurice Crump)